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LAW OFFICE
THOMAS F. MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

May 22, 2007

By e-filing

Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: STB Finance Docket No 34870, *PYCO Industries, Inc v South Plains Switching, Ltd Co*

Dear Mr. Williams:

This refers to the "Amendment/Supplement to Complaint and Statement Concerning Damages" (Amendment) filed by PYCO Industries, Inc (PYCO) on May 17, 2007

All of the damages now sought as a result of the Amendment relate to transportation of cottonseed. See Amendment, Exhibit A, Actual Damages Incurred¹¹ As made clear in a Motion to Dismiss filed by South Plains Switching, Ltd Co (SAW) on May 9, 2006 (at 2-3), rail transportation of cottonseed has been exempted from the Board's regulatory authority under Subtitle IV of Title 49. See 49 C F R § 1039.10, *Rail General Exemption Authority*, 367 I C C 298, 310-312 (1983)

It is clear that in regard to PYCO's claim for damages for violation of Subtitle IV in regard to rail transportation of cottonseed, the Board does not have authority to retroactively revoke that exemption. That being the case, the complaint is required to be dismissed insofar as it seeks damages for violations of Subtitle IV inasmuch as the cottonseed exemption was in effect during the entire period under consideration. See *Pejepscot Industrial Park, Inc -- Pet for Declar Order*, 2003 STB LEXIS 253 at *12-13 (Finance Docket No 33989, served May 15, 2003), *Consolidated Rail Corp -- Aband Exempt -- in Erie County, NY*, 1998 STB LEXIS 777 (Docket No 42028, served Oct. 7, 1998 at 9); and *Consolidated Rail Corp -- Declar Order -- Exempt.*, 1 I C C 2d 895, 900 (1986), *aff'd sub nom G&T Terminal Packaging Co v Consolidated Rail Corp.*, 830 F 2d 1230, 1235 (3rd Cir. 1987).

¹¹ Thus, PYCO seeks damages for "(c)osts of seed shipped from Plainview, TX," "(a)dditional costs to haul seed around SAW," and "(l)oss of oil quality on seed" (*id*, emphasis added). Likewise, the surcharges and constructive placement charges sought to be recovered were applied to shipments of cottonseed and to placement of cottonseed cars.

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It is also clear that PYCO does not require relief for the future inasmuch as alternative rail service is being provided over the involved rail line and rail service will be provided by an entity other than SAW at the conclusion of alternative rail service pursuant to feeder line development applications.

SAW submits that where, as here, it has been shown that there is a substantial likelihood that the complaint will be dismissed for lack of subject matter jurisdiction in light of the commodity exemption for cottonseed, judicial economy and procedural fairness dictate that the motion to dismiss proceed to decision before the complaint is processed on an evidentiary basis

Accordingly, SAW respectfully requests that the Board's decision served May 2, 2007 be vacated,^u and that the complaint be held in abeyance pending disposition of the Motion to Dismiss ^u

Respectfully submitted,



Thomas F. McFarland
Attorney for South Plains
Switching, Ltd Co

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cc Charles Montange, Esq., *by e-mail*
Mr Larry Wiscner & Mrs. Delilah Wisener, *by e-mail*
Mr. Dennis Olmstead, *by e-mail*

^u That decision provided for processing the complaint on an evidentiary basis at this time

^u This request is intended to supercede SAW's procedural request to the Board, dated May 17, 2007.